

APPENDIX B-8

STANDARD TERMS AND CONDITIONS FOR SUBCONTRACTS TO PURCHASE COMMERCIAL ITEMS

**APPENDIX B-8
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CLAUSES

CLAUSE 1 - YEAR 2000 CERTIFICATION AND WARRANTY OF INFORMATION TECHNOLOGY PRODUCTS AND SERVICES (SPECIAL)(FEB 1999)

(Applies to subcontracts for information technology products or services)

A. Definitions

1. “Year 2000 Compliance,” as used in this clause, means that the information technology products and services delivered or developed under this subcontract accurately process date/time data from, into, and between the twentieth and twenty-first centuries, and the years 1999 and 2000, and leap year calculations, to the extent that other information technology, used in combination with the information technology being delivered or developed under this subcontract, properly exchanges date/time data with it.
2. “Information technology products and services” as used in this clause, include, but are not limited to, hardware, software, and/or firmware and embedded systems or any other electro-mechanical or processor-based systems or services.
3. “Date/time data,” as used in this clause, includes but is not limited to, calculating, comparing, and sequencing.

B. Certification

The delivery or development of information technology products or services by the Subcontractor/Supplier shall constitute constructive certification that the information technology products or services under this subcontract demonstrate Year 2000 Compliance.

C. Warranty

The Subcontractor/Supplier warrants that each commercial or noncommercial information technology product or service delivered or developed under this subcontract is Year 2000 Compliant. If the subcontract requires that specific information technology products or services must perform as a system in accordance with the foregoing warranty, then this warranty shall apply to those products or services as a system.

D. Duration and Remedies

The duration of this warranty and the remedies available to NREL/Government for breach of this warranty shall be as defined in, and subject to: 1) the terms and limitations of the general warranty provisions of this subcontract; or, 2) the terms and limitations of the Subcontractor's/Supplier's standard commercial warranty or warranties contained in this subcontract.

Notwithstanding any provision to the contrary in such warranty provision(s), or in the absence of any such warranty provision(s), the remedies available to NREL/Government under this Year 2000 Compliance warranty shall include repair or replacement, at no additional cost to NREL/Government, of any information technology product or service where noncompliance is

discovered and made known to the Subcontractor/Supplier in writing within ninety (90) days after acceptance. Nothing in this warranty shall be construed to limit any rights or remedies NREL/Government may otherwise have under this subcontract with respect to defects other than Year 2000 compliance.

E.Subcontractor/Supplier as Distributor

If the Subcontractor/Supplier is a distributor of technology information products obtained from third party manufacturers, the Subcontractor/Supplier agrees to obtain from the third party manufacturers certifications and warranties that substantially conform to the requirements of this clause.

F.Lower-tier Subcontracts

The Subcontractor/Supplier agrees to insert terms that conform substantially to the language of this clause, including this paragraph F, in all lower-tier subcontracts/purchase orders under this subcontract.

CLAUSE 2 - DEFINITIONS (SPECIAL) (JUL 1998)

Derived from FAR 52.202-1 (OCT 1995)

(Applies to subcontracts exceeding \$100,000)

A."Head of the agency" also called "agency head") or "Secretary" means the Secretary (or Attorney General, Administrator, Governor, Chairperson, or other chief official, as appropriate) of the agency, including any deputy or assistant chief official of the agency; and the term "authorized representative" means any person, persons, or board (other than the Contracting Officer) authorized to act for the head of the agency or Secretary.

B."Commercial component" means any component that is a commercial item.

C."Commercial item" means --

1. Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that --
 - (i) Has been sold, leased, or licensed to the general public; or
 - (ii) Has been offered for sale, lease, or license to the general public;
2. Any item that evolved from an item described in paragraph (C)(1) of this clause through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a government solicitation;
3. Any item that would satisfy a criterion expressed in paragraphs (C)(1) or (C)(2) of this clause, but for --
 - (i) Modifications of a type customarily available in the commercial marketplace; or

- (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. "Minor" modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;
- 4. Any combination of items meeting the requirements of paragraphs (C)(1), (2), (3), or (5) of this clause that are of a type customarily combined and sold in combination to the general public;
- 5. Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (C)(1), (2), (3), or (4) of this clause, and if the source of such services --
 - (i) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and
 - (ii) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;
- 6. Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed;
- 7. Any item, combination of items, or service referred to in subparagraphs (C)(1) through (C)(6), notwithstanding the fact that the item, combination or items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of the subcontractor; or
- 8. A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and Local Governments.
- D. "Component" means any item supplied to the Federal Government as part of an end item or of another component.
- E. "Nondevelopmental item" means --
 - 1. Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local Government, or a foreign Government with which the United States has a mutual defense cooperation agreement;

2. Any item described in paragraph (E)(1) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or
 3. Any item of supply being produced that does not meet the requirements of paragraph (E)(1) or (E)(2) solely because the item is not yet in use.
- F. "DOE Contracting Officer" means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the DOE Contracting Officer acting within the limits of their authority as delegated by the DOE Contracting Officer.
- G. Except as otherwise provided in this subcontract, the term "lower-tier subcontracts" includes, but is not limited to, purchase orders and changes and modifications to purchase orders under this subcontract.
- H. The term "DOE" means the Department of Energy and "FERC" means the Federal Energy Regulatory Commission.
- I. The term "NREL" means the National Renewable Energy Laboratory Division of the Midwest Research Institute, a not-for-profit Missouri Corporation, and includes its successors and assigns of the NREL Division of Midwest Research Institute. The NREL facility is a Department of Energy-owned national laboratory, operated and managed under Contract No. DE-AC36-98-GO10337 by the NREL Division of the Midwest Research Institute.
- J. The term "Subcontractor" as used herein includes lower-tier subcontractors, independent contractors, and all other classes of persons performing any type of work under this subcontract.

**CLAUSE 3 - LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN
FEDERAL TRANSACTIONS (JUN 1997)**

Derived from FAR 52-203-12

(Applies to subcontracts exceeding \$100,000)

A. Definitions.

"Agency," as used in this clause, means executive agency as defined in FAR 2.101.

"Covered Federal action," as used in this clause, means any of the following Federal actions:

1. The awarding of any Federal contract.
2. The making of any Federal grant.
3. The making of any Federal loan.
4. The entering into of any cooperative agreement.
5. The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

"Indian tribe" and "tribal organization," as used in this clause, have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 B) and include Alaskan Natives.

"Influencing or attempting to influence," as used in this clause, means making, with the intent to influence, any communication to or appearance before an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

"Local Government," as used in this clause, means a unit of Government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a Local Government.

"Officer or employee of an agency," as used in this clause, includes the following individuals who are employed by an agency:

1. An individual who is appointed to a position in the Government under Title 5, United States Code, including a position under a temporary appointment.
2. A member of the uniformed services, as defined in subsection 101(3), Title 37, United States Code.
3. A special Government employee, as defined in section 202, Title 18, United States Code.
4. An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, Title 5, United States Code, appendix 2.

"Person," as used in this clause, means an individual, corporation, company, association, authority, firm, partnership, society, State, and Local Government, regardless of whether such entity is operated for profit, or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

"Reasonable compensation," as used in this clause, means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

"Reasonable payment," as used in this clause, means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

"Recipient," as used in this clause, includes the Subcontractor and all lower-tier subcontractors. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

"Regularly employed," as used in this clause, means, with respect to an officer or employee of a person requesting or receiving a Federal contract, an officer or employee who is employed by such person for at least one hundred and thirty (130) working days within one (1) year immediately

preceding the date of the submission that initiates agency consideration of such person for receipt of such contract. An officer or employee who is employed by such person for less than one hundred and thirty (130) working days within one (1) year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for one hundred and thirty (130) working days.

"State," as used in this clause, means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and multi-State, regional, or interstate entity having governmental duties and powers.

B. Prohibitions.

1. Section 1352 of Title 31, United States Code, among other things, prohibits a recipient of a Federal contract, grant, loan, or cooperative agreement from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract; the making of any Federal grant; the making of any Federal loan; the entering into of any cooperative agreement; or the modification of any Federal contract, grant, loan, or cooperative agreement.
2. The Act also requires Subcontractors to furnish a disclosure if any funds other than Federal appropriated funds (including profit or fee received under a covered Federal transaction) have been paid, or will be paid, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a Federal contract, grant, loan, or cooperative agreement.
3. The prohibitions of the Act do not apply under the following conditions:
 - (i) Agency and legislative liaison by own employees.
 - a. The prohibition on the use of appropriated funds, in subparagraph (B)(1) of this clause, does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.
 - b. For purposes of subdivision (B)(3)(i)(a) of this clause, providing any information specifically requested by an agency or Congress is permitted at any time.
 - c. The following agency and legislative liaison activities are permitted at any time where they are not related to a specific solicitation for any covered Federal action:

1. Discussing with an agency the qualities and characteristics (including individual demonstrations) of the person's products or services, conditions or terms of sale, and service capabilities.
 2. Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.
- d. The following agency and legislative liaison activities are permitted where they are prior to formal solicitation of any covered Federal action --
1. Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;
 2. Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and
 3. Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub.L.95-507, and subsequent amendments.
- e. Only those services expressly authorized by subdivision (B)(3)(i)(a) of this clause are permitted under this clause.
- (ii) Professional and technical services.
- a. The prohibition on the use of appropriated funds, in subparagraph (B)(1) of this clause, does not apply in the case of --
1. A payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action or an extension, continuation, renewal, amendment, or modification of a covered Federal action, if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action.
 2. Any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action or an extension, continuation, renewal, amendment, or modification of a covered Federal action if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action. Persons other than officers or employees of a

person requesting or receiving a covered Federal action include consultants and trade associations.

- b. For purposes of subdivision (B)(3)(ii)(a) of this clause, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.
- c. Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation and any other requirements in the actual award documents.
- d. Only those services expressly authorized by subdivisions (B)(3)(ii)(a)(1) and (2) of this clause are permitted under this clause.
- e. The reporting requirements of FAR 3.803(a) shall not apply with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

C. Disclosure.

- 1. The Subcontractor who requests or receives from an agency a Federal contract shall file with that agency a disclosure form, OMB standard form LLL, Disclosure of Lobbying Activities, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under subparagraph (B)(1) of this clause, if paid for with appropriated funds.
- 2. The Subcontractor shall file a disclosure form at the end of each calendar quarter in which there occurs any event that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under subparagraph (C)(1) of this

clause. An event that materially affects the accuracy of the information reported includes-

- (i) A cumulative increase of \$25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or
- (ii) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or
- (iii) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

- 3. The Subcontractor shall require the submittal of a certification, and if required, a disclosure form by any person who requests or receives any subcontract exceeding \$100,000 under the Federal contract.
- 4. All lower-tier subcontractor disclosure forms (but not certifications) shall be forwarded from tier to tier until received by the Subcontractor. The Subcontractor shall submit all disclosures to the NREL Subcontract Administrator at the end of the calendar quarter in which the disclosure form is submitted by the Subcontractor. Each lower-tier subcontractor certification shall be retained in the subcontract file of the awarding Subcontractor.

D. Agreement.

The Subcontractor agrees not to make any payment prohibited by this clause.

E. Penalties.

- 1. Any person who makes an expenditure prohibited under paragraph (A) of this clause or who fails to file or amend the disclosure form to be filed or amended by paragraph (B) of this clause shall be subject to civil penalties as provided for by 31 U.S.C. 1352. An imposition of a civil penalty does not prevent the Government from seeking any other remedy that may be applicable.
- 2. Subcontractors may rely without liability on the representation made by their lower-tier subcontractors in the certification and disclosure form.

F. Cost allowability.

Nothing in this clause makes allowable or reasonable any costs which would otherwise be unallowable or unreasonable. Conversely, costs made specifically unallowable by the requirements in this clause will not be made allowable under any other provision.

CLAUSE 4 - COMMERCIAL ITEMS - SUBCONTRACT TERMS AND CONDITIONS (MAY 1999) and DISPUTES (SPECIAL) (APR 1997)

Derived from FAR 52-212-4

A. Inspection/Acceptance.

The Subcontractor shall only tender for acceptance those items that conform to the requirements of this subcontract. NREL/Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. NREL/Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. NREL/Government must exercise its post acceptance rights--

1. Within a reasonable time after the defect was discovered or should have been discovered; and
2. Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

B. Assignment.

The Subcontractor or its assignee's rights to be paid amounts due as a result of performance of this subcontract, may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727).

C. Changes.

Changes in the terms and conditions of this subcontract may be made only by written agreement of the parties.

D. Disputes (SPECIAL) (APR 1997)

1. The parties agree that the appropriate forum for resolution of any dispute or claim pertaining to this subcontract shall be a court of competent jurisdiction as follows:
 - A. Subject to paragraph (A)(2) of this clause, any such litigation shall be brought and prosecuted exclusively in Federal District Court; with venue in the United States District Court of Colorado in Denver, Colorado.
 - B. Provided, however, that in the event that the requirements for jurisdiction in any Federal District Court are not presented, such litigation shall be brought in a court of competent jurisdiction in the county of Jefferson and State of Colorado.
2. Any substantive issue of law in such dispute, claim, or litigation shall be determined in accordance with the body of applicable Federal law relating to the interpretation and application of clauses derived from Federal Acquisition Regulations. If there is no applicable Federal law, the law of the State of Colorado shall apply in the determination of such issues. Nothing in this clause shall grant to the Subcontractor by implication any statutory rights or remedies not expressly set forth in this subcontract.
3. There shall be no interruption in the prosecution of the work, and the Subcontractor shall proceed diligently with the performance of this subcontract pending final resolution of any dispute, claim, or litigation arising under or related to this subcontract between the parties hereto or between the Subcontractor and lower-tier subcontractors or suppliers.

4. The Contract Disputes Act of 1978 (41 U.S.C. Sections 601-613) shall not apply to this subcontract; provided, however, that nothing in this clause shall prohibit NREL, in its sole discretion, from sponsoring a claim of the Subcontractor for resolution under the provision of its prime contract with DOE. In the event that NREL so sponsors a claim at the request of the Subcontractor, the Subcontractor shall be bound by the decision of the cognizant DOE Contracting Officer to the same extent and in the same manner as NREL.
5. Any disputes relative to intellectual property matters will be governed by other provisions of this subcontract..

E. Definitions.

The clause at FAR 52.202.1, *Definitions*, is incorporated by reference.

F. Excusable delays.

The Subcontractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Subcontractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Subcontractor shall notify the NREL Subcontract Administrator in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the NREL Subcontract Administrator of the cessation of such occurrence.

G. Invoice.

The Subcontractor shall submit an original invoice and three copies (or electronic invoice, if authorized), to the address designated in the subcontract to receive invoices. An invoice must include--

1. Name and address of the Subcontractor;
2. Invoice date;
3. Subcontract number, subcontract line item number and, if applicable, the order number;
4. Description, quantity, unit of measure, unit price, and extended price of the items delivered;
5. Shipping number and date of shipment including the bill of lading number and weight of shipment if shipped on Government bill of lading;
6. Terms of any prompt payment discount offered;
7. Name and address of official to whom payment is to be sent; and
8. Name, title, and phone number of person to be notified in event of defective invoice.

Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment. Subcontractors are encouraged to assign an identification number to each invoice.

H. Patent indemnity.

The Subcontractor shall indemnify the Government, NREL, and its officers, employees, and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this subcontract, provided the Subcontractor is reasonably notified of such claims and proceedings.

I. Payment.

Payment shall be made for items accepted by NREL that have been delivered to the delivery destinations set forth in this subcontract. NREL will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment. Unless otherwise provided by an addendum to this subcontract, NREL shall make payment in accordance with the clause at FAR 52.232-33, Mandatory Information for Electronic Funds Transfer Payment, which is incorporated herein by reference. In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

J. Risk of loss.

Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this subcontract shall remain with the Subcontractor until, and shall pass to NREL/Government upon:

1. Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or
2. Delivery of the supplies to NREL at the destination specified in the subcontract, if transportation is f.o.b. destination.

K. Taxes.

The subcontract price includes all applicable Federal, State, and Local taxes and duties.

L. Termination for NREL's or the Government's convenience.

NREL/Government reserves the right to terminate this subcontract, or any part hereof, for its sole convenience. In the event of such termination, the Subcontractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and lower-tier subcontractors to cease work. Subject to the terms of this subcontract, the Subcontractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Subcontractor can demonstrate to the satisfaction of NREL using its standard record keeping system, have resulted from the termination. The Subcontractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give NREL/Government any right to audit the

Subcontractor's records. The Subcontractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

M. Termination for cause.

NREL/Government may terminate this subcontract, or any part hereof, for cause in the event of any default by the Subcontractor, or if the Subcontractor fails to comply with any subcontract terms and conditions, or fails to provide NREL, upon request, with adequate assurances of future performance. In the event of termination for cause, NREL/Government shall not be liable to the Subcontractor for any amount for supplies or services not accepted, and the Subcontractor shall be liable to NREL for any and all rights and remedies provided by law. If it is determined that NREL improperly terminated this subcontract for default, such termination shall be deemed a termination for convenience.

N. Title.

Unless specified elsewhere in this contract, title to items furnished under this subcontract shall pass to NREL/Government upon acceptance, regardless of when or where NREL/Government takes physical possession.

O. Warranty.

The Subcontractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this subcontract.

P. Limitation of liability.

Except as otherwise provided by an express or implied warranty, the Subcontractor will not be liable to NREL for consequential damages resulting from any defect or deficiencies in accepted items.

Q. Other compliances.

The Subcontractor shall comply with all applicable Federal, State and Local laws, executive orders, rules, and regulations applicable to its performance under this subcontract.

R. Compliance with laws unique to Government contracts.

The Subcontractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. 327, et seq., Contract Work Hours and Safety Standards Act; 41 U.S.C. 51-58, Anti-Kickback Act of 1986; 41 U.S.C. 265 and 10 U.S.C. 2409 relating to whistle blower protections; 49 U.S.C. 40118, Fly American; and 41 U.S.C. 423 relating to procurement integrity.

S. Order of precedence.

Any inconsistencies in this solicitation or subcontract shall be resolved by giving precedence in the following order:

1. The schedule of supplies/services.

2. The Assignments, Disputes, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts paragraphs of this clause.
3. The clause at FAR 52.212-5.
4. Addenda to this solicitation or subcontract, including any license agreements for computer software.
5. Solicitation provisions if this is a solicitation.
6. Other paragraphs of this clause.
7. The Standard Form 1449.
8. Other documents, exhibits, and attachments.
9. The specification.

**CLAUSE 5 - CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT
STATUTES OR EXECUTIVE ORDERS -- COMMERCIAL ITEMS (JUL 2000)**

Derived from FAR 52.212-5

- A. [Reserved.]
- B. The Subcontractor agrees to comply with the FAR clauses in this paragraph (B) which the NREL Subcontract Administrator has indicated as being incorporated in this subcontract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

(NREL Subcontract Administrator shall check as appropriate.)

___ (1) 52.203-6, Restrictions on Subcontractor Sales to the Government, with Alternate I (41 U.S.C. 253g and 10 U.S.C. 2402).

___ (2) 52.219-3, Notice of Total HUBZone Small Business Set-Aside (Jan 1999)

___ (3) 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (Jan 1999) (if the offeror elects to waive the preference, it shall so indicate in its offer).

___ (4)(i) 52.219-5, Very Small Business Set-Aside (Pub. L. 103-403, section 304, Small Business Reauthorization and Amendments Act of 1994).

___ (ii) Alternate I to 52.219-5.

___ (iii) Alternate II to 52.219-5.

___ (5) 52.219-8, Utilization of Small Business Concerns (15 U.S.C. 637 (d)(2) and (3)).

- ___ (6) 52.219-9, Small Business Subcontracting Plan (15 U.S.C. 637(d)(4)).
- ___ (7) 52.219-14, Limitations on Subcontracting (15 U.S.C. 637(a)(14)).
- ___ (8)(i) 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323) (if the offeror elects to waive the adjustment, it shall so indicate in its offer).
- ___ (ii) Alternate I of 52.219-23.
- ___ (9) 52.219-25, Small Disadvantaged Business Participation Program--Disadvantaged Status and Reporting (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).
- ___ (10) 52.219-26, Small Disadvantaged Business Participation Program--Incentive Subcontracting (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).
- ___ (11) 52.222-21, Prohibition of Segregated Facilities (Feb 1999)
- ___ (12) 52.222-26, Equal Opportunity (E.O. 11246).
- ___ (13) 52.222-35, Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era (38 U.S.C. 4212).
- ___ (14) 52.222-36, Affirmative Action for Workers with Disabilities (29 U.S.C. 793).
- ___ (15) 52.222-37, Employment Reports on Disabled Veterans and Veterans of the Vietnam Era (38 U.S.C. 4212).
- ___ (16) 52.225-1, Buy American Act--Balance of Payments Program--Supplies (41 U.S.C. 10a - 10d).
- ___ (17)(i) 52.225-3, Buy American Act--North American Free Trade Agreement--Israeli Trade Act--Balance of Payments Program (41 U.S.C. 10a - 10d, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note).
- ___ (ii) Alternate I of 52.225-3.
- ___ (iii) Alternate II of 52.225-3.
- ___ (18) 52.225-5, Trade Agreements (19 U.S.C. 2501, et seq., 19 U.S.C. 3301 note).
- ___ (19) 52.225-13, Restriction on Certain Foreign Purchases (E.O. 12722, 12724, 13059, 13067, 13121, and 13129).
- ___ (20) 52.225-15, Sanctioned European Union Country End Products (E.O. 12849).
- ___ (21) 52.225-16, Sanctioned European Union Country Services (E.O. 12849).
- ___ (22) 52.232-33, Payment by Electronic Funds Transfer--Central Contractor

Registration (31 U.S.C. 3332).
___ (23) 52.232-34, Payment by Electronic Funds Transfer--Other than Central Contractor
Registration (31 U.S.C. 3332).

___ (24) 52.232-36, Payment by Third Party (31 U.S.C. 3332).

___ (25) 52.239-1, Privacy or Security Safeguards (5 U.S.C. 552a).

___ (26)(i) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46
U.S.C. 1241).

___ (ii) Alternate I of 52.247-64.

- C. The Subcontractor agrees to comply with the FAR clauses in this paragraph (C), applicable to commercial services, which the NREL Subcontract Administrator has indicated as being incorporated in this subcontract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

(NREL Subcontract Administrator check as appropriate.)

- ___ 1. 52.222-41, Service Contract Act of 1965, As Amended (41 U.S.C. 351, et seq.).
- ___ 2. 52.222-42, Statement of Equivalent Rates for Federal Hires (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).
- ___ 3. 52.222-43, Fair Labor Standards Act and Service Contract Act -- Price Adjustment (Multiple Year and Option Subcontracts) (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).
- ___ 4. 52.222-44, Fair Labor Standards Act and Service Contract Act -- Price Adjustment (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).
- ___ 5. 52.222-47, SCA Minimum Wages and Fringe Benefits Applicable to Successor Subcontract Pursuant to Predecessor Subcontractor Collective Bargaining Agreement (CBA) (41 U.S.C. 351, et seq.).
- ___ 6. 52.222-50, Nondisplacement of Qualified Workers (Executive Order 12933).

D. Comptroller General Examination of Record

The Subcontractor agrees to comply with the provisions of this paragraph (D) if this subcontract was awarded using other than sealed bid, is in excess of the simplified acquisition threshold (\$100,000), and does not contain the clause at FAR 52.215-2, Audit and Records -- Negotiation.

1. The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Subcontractor's directly pertinent records involving transactions related to this subcontract.

2. The Subcontractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until three (3) years after final payment under this subcontract or for any shorter period specified in FAR Subpart 4.7, Contractor Records Retention, of the other clauses of this subcontract. If this subcontract is completely or partially terminated, the records relating to the work terminated shall be made available for three (3) years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this subcontract shall be made available until such appeals, litigation, or claims are finally resolved.
 3. As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require the Subcontractor to create or maintain any record that the Subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.
- E. Notwithstanding the requirements of the clauses in paragraphs (A), (B), (C) or (D) of this clause, the Subcontractor is not required to include any FAR clause, other than those listed below (and as may be required by an addenda to this paragraph to establish the reasonableness of prices under FAR Part 15), in a lower-tier subcontract for commercial items or commercial components--
1. 52.222-26, Equal Opportunity (E.O. 11246);
 2. 52.222-35, Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era (38 U.S.C. 4212);
 3. 52.222-36, Affirmative Action for Workers with Disabilities (29 U.S.C. 793); and
 4. 52.247-64, Preference for Privately-Owned U.S. Flag Commercial Vessels (46 U.S.C. 1241) (flow down not required for subcontracts awarded beginning May 1, 1996).

CLAUSE 6 - BANKRUPTCY (JUL 1995)

Derived from FAR 52.242-13

(Applies to subcontracts exceeding \$100,000)

In the event the Subcontractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, the Subcontractor agrees to furnish, by certified mail or electronic commerce method authorized by the contract, written notification of the bankruptcy to the NREL Subcontract Administrator responsible for administering the subcontract. This notification shall be furnished within five (5) days of the initiation of the proceedings relating to bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of Government contract numbers and contracting offices for all Government contracts against which final payment has not been made. This obligation remains in effect until final payment under this subcontract.

CLAUSE 7 - REFUND OF ROYALTIES (FEB 1995)

Derived from DEAR 952.227-9 (FD)

- A. The subcontract price includes certain amounts for royalties payable by the Subcontractor or lower-tier subcontractors or both, which amounts have been reported to the DOE through NREL.
- B. The term "royalties" as used in this clause refers to any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like, for the use of or for rights in patents and patent applications in connection with performing this subcontract or any lower-tier subcontract hereunder. The term also includes any costs or charges associated with the access to, use of, or other right pertaining to data that is represented to be proprietary and is related to the performance of this subcontract or the copying of such data or data that is copyrighted.
- C. The Subcontractor shall furnish to the DOE through NREL, before final payment under this subcontract, a statement of royalties paid or required to be paid in connection with performing this subcontract and lower-tier subcontracts hereunder together with the reasons.
- D. The Subcontractor will be compensated for royalties reported under paragraph (C) of this clause, only to the extent that such royalties were included in the subcontract price and are determined by the DOE to be properly chargeable to the Government and allocable to the subcontract. To the extent that any royalties that are included in the subcontract price are not, in fact, paid by the Subcontractor or are determined by the DOE not to be properly chargeable to the Government and allocable to the subcontract, the subcontract price shall be reduced. Repayment or credit to the Government shall be made as the DOE directs. The approval by DOE of any individual payments or royalties shall not prevent the Government from contesting at any time the enforceability, validity, scope of, or title to, any patent or the proprietary nature of data pursuant to which a royalty or other payment is to be or has been made.
- E. If, at any time within three (3) years after final payment under this subcontract, the Subcontractor for any reason is relieved in whole or in part from the payment of the royalties included in the final subcontract price as adjusted pursuant to paragraph (D) of this clause, the Subcontractor shall promptly notify the DOE through NREL of that fact and shall reimburse the Government in a corresponding amount.
- F. The substance of this clause, including this paragraph (F), shall be included in any subcontract in which the amount of royalties reported during negotiation of the subcontract exceeds \$250.

CLAUSE 8 - TAXES (APR 1984)

Derived from DEAR 970.5204-23

- A. The Subcontractor agrees to notify the NREL Subcontract Administrator of any State or local tax, fee, or charge levied or purported to be levied on or collected from the Subcontractor with respect to the subcontract work, any transaction thereunder, or property in the custody or control of the Subcontractor and constituting an allowable item of cost if due and payable, but which the Subcontractor has reason to believe, or the NREL Subcontract Administrator has advised the Subcontractor, is or may be inapplicable or invalid; * and the Subcontractor further agrees to refrain from paying any such tax, fee, or charge unless authorized in writing by the NREL Subcontract Administrator. Any State or local tax, fee, or charge paid with the approval of the NREL Subcontract Administrator or on the basis of advice from the NREL Subcontract Administrator that such tax, fee, or charge is applicable and valid, and which would otherwise be an allowable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax, fee, or charge was in fact inapplicable or invalid.

**Requirement for notice may be broadened to include all State and local taxes which may be claimed as allowable costs when considered to be appropriate.*

- B. The Subcontractor agrees to take such action as may be required or approved by the NREL Subcontract Administrator to cause any State or local tax, fee, or charge which would be an allowable cost to be paid under protest; and to take such action as may be required or approved by the NREL Subcontract Administrator to seek recovery of any payments made, including assignment to NREL/Government, or its designee of all rights to an abatement or refund thereof, and granting permission for NREL/Government to join with the Subcontractor in any proceedings for the recovery thereof or to sue for recovery in the name of the Subcontractor. If the NREL Subcontract Administrator directs the Subcontractor to institute litigation to enjoin the collection of or to recover payment of any such tax, fee, or charge referred to above, or if a claim or suit is filed against the Subcontractor for a tax, fee, or charge it has refrained from paying in accordance with this article, the procedures and requirements of the article entitled "Litigation and Claims" shall apply and the costs and expenses incurred by the Subcontractor shall be allowable items of costs, as provided in this subcontract, together with the amount of any judgment rendered against the Subcontractor.
- C. NREL/Government shall hold the Subcontractor harmless from penalties and interest incurred through compliance with this clause. All recoveries or credits in respect of the foregoing taxes, fees, and charges (including interest) shall inure to and be for the sole benefit of NREL/Government.

CLAUSE 9 - ACCESS SECURITY (SPECIAL)(APR 1999)

- A. **Access to NREL operated facilities is controlled in accordance with the DOE's requirements. The Subcontractor shall ensure that any of its, or its lower-tier subcontractors, officers, employees, or agents be specifically authorized site access by an NREL employee, and identified, badged, and registered by NREL Security prior to entering any NREL operated facility.**
- B. **The Subcontractor shall further ensure that any of its, or its lower-tier subcontractors, officers, employees, or agents who are not U.S. citizens or U.S. permanent residents and who will perform subcontract work on NREL operated facilities for a total of thirty (30) calendar days or greater, or who are citizens of a DOE designated sensitive country, or who work for a company based in a sensitive country, or who are stateless persons, submit a completed DOE Form IA 473 to NREL six to eight weeks before access is required. Access shall be subject to DOE approval. Any such person denied access by DOE shall not be assigned by the Subcontractor to work at NREL operated facilities.**
- C. **The Subcontractor shall provide to the Subcontract Administrator, prior to the initiation of work, evidence, including visa types and expiration dates, that legally sufficient work permits have been obtained from the U.S. Immigration and Naturalization Service, and such permits are properly maintained, for any of its, or its lower-tier subcontractors officers, employees, or agents who are not U.S. citizens or U.S. permanent residents and who will perform subcontract work at NREL operated facilities.**

- 4. Further, after the Subcontractor, or its lower-tier subcontractors, has commenced subcontract work, the Subcontractor shall provide to the Subcontract Administrator similar advance notice, including visa types and expiration dates, for all subsequently assigned individuals who are not U.S. citizens or U.S. permanent residents who will perform subcontract work at NREL operated facilities.
- E. NREL reserves the right to revoke site access authorization for any person violating NREL or DOE safety and security policies and procedures.
- F. As a condition of entry to NREL premises, the Subcontractor agrees to permit NREL security personnel to search its, and its lower-tier subcontractors, officers, employees, or agents vehicles, packages, tool boxes, or other containers for the purpose of preventing prohibited articles access to NREL premises or to detect or deter the unauthorized removal of Government property from NREL.
- G. Prohibited articles include cameras, copying machines, reproduction devices, recording devices, radio transmitters, firearms, explosive devices, incendiary devices, dangerous weapons or materials, controlled substances (illegal drugs), or alcoholic beverages.
- H. The Subcontractor shall include this article, including this Paragraph H, in all lower-tier subcontracts involving work at NREL operated facilities.